STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of M. HILL, Minor.

UNPUBLISHED
November 26, 2013

No. 315253
Genesee Circuit Court
Family Division
LC No. 12-129420-NA

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order finding jurisdiction over the minor child under MCL 712A.2(b). We affirm.

I. AUTHORIZATION OF THE PETITION

Respondent first argues that the trial court reversibly erred by authorizing the petition for temporary custody. A trial court's findings of fact in a child protection proceeding are reviewed for clear error. *In re Mason*, 486 Mich 142, 147; 782 NW2d 747 (2010). "A finding is 'clearly erroneous' if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id*. (citation omitted).

MCR 3.963(B) allows the court to issue a written order authorizing a Child Protective Services (CPS) worker to take a child into protective custody when, "upon presentment of proofs as required by the court, the judge or referee has reasonable grounds to believe that the conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child[.]" MCR 3.963(B)(1). In so doing, the trial court must make a determination that reasonable efforts to prevent removal have been made. *Id*. Further, a person who takes the child into custody must immediately attempt to notify the child's parent of the protective custody and inform the parent of the date, time, and place of the preliminary hearing scheduled by the court. MCR 3.963(C)(1) and (2).

MCR 3.963(B) does not require that parents have notice of the hearing or state any burden of proof except that the trial court must have reasonable grounds on which to base its findings. The only notice provision of MCR 3.963 is that, after the removal, parents must be notified of the preliminary hearing scheduled by the court. MCR 3.963(C)(2). Here, respondent's whereabouts were unknown, which was part of the basis for the petition, and the CPS worker testified that she attempted to call respondent. The petition to temporarily remove

the minor child from respondent's custody was also based on respondent's failure to voluntarily participate in services and the fact that respondent left the minor child with her adult sister with no return date. The trial court found that the conditions or surroundings under which the child was found were such as would endanger the health, safety, or welfare of the child, that remaining in the home would be contrary to the welfare of the child, and that reasonable efforts to prevent removal were made.

Based upon the information in the petition and the CPS worker's testimony, the trial court did not clearly err in its factual findings. Because the trial court followed the requirements of MCR 3.963(B) and (C), we find no error in the authorization of the petition pending the preliminary hearing.

II. PROCEDURAL DUE PROCESS

Next, respondent argues that the trial court violated her procedural due process rights in numerous ways before and during the trial on jurisdiction. This Court reviews an unpreserved constitutional claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A trial court's decision to grant or deny a motion for an adjournment is reviewed for an abuse of discretion. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

"Due process applies to any adjudication of important rights. Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *In re Brock*, 442 Mich 101, 110; 499 NW2d 752 (1993). "An adjudication proceeding determines whether the probate court may acquire jurisdiction over a child. Hence, the liberty interest at stake is the parents' interest in the management of their children." *Id*. at 112. Parents have due process rights in child protection proceedings.

Respondent first argues that her due process rights were violated because the hearing was untimely and she lacked notice. The Michigan Court Rules set forth the procedure for the court's taking jurisdiction over a child. MCR 3.972(A) requires that, where a child is in placement, the trial must commence as soon as possible, but no later than 63 days after the child is removed, with certain exceptions. MCR 3.972(A). Here, the child was removed on October 24, 2012. Several hearings were adjourned because the parents had not been served and did not appear. Petitioner twice filed affidavits of efforts to locate the parents. On January 23, 2013, petitioner was ordered to file a motion for alternate service. The matter was adjourned to February 20, 2013, and notice was made through publication.

It is clear that the matter was adjourned past the 63-day deadline because service could not be completed. The remedy for violating the 63-day deadline of MCR 3.972(A) is return of the child, not dismissal of proceedings. Because the trial court properly adjourned the trial on jurisdiction beyond the 63-day deadline due to lack of service, and could not find respondent to return the child, respondent's due process rights were not violated by the delay.

Next, respondent argues that the trial court violated her due process rights by taking testimony on January 23, 2013, although respondent had not been served notice of that hearing,

and by preserving that testimony. First, it is not clear that the trial court considered the testimony of the CPS worker in making its decision, and the worker was recalled at the February 26, 2013 trial and her testimony then mirrored her previous testimony. Second, respondent was represented by counsel at the hearing and her counsel questioned the CPS worker. Although the "preservation" of this testimony was not ideal, because the CPS worker's testimony was essentially the same at the trial, respondent's substantial rights were not affected by the error. *Carines*, 460 Mich at 763.

Respondent also argues that the trial court placed impermissible pressure on her to give up her right to a hearing by offering to consider allowing parenting time if respondent pleaded to part of the petition. The record reflects that the trial court informed respondent that if she admitted to part of the petition, the court would entertain her right to see the child. The court stated, "That's what's in it for her if she acknowledges today. If Mother does not admit, the matter would be set for another day." The trial court further indicated that if respondent was willing to admit to the petition, the court would grant her some supervised contact with the child. A plea of admission to allegations in a petition must be voluntarily made. MCR 3.971(C)(1) ("court shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made"). Respondent refused the court's invitation to enter a plea, but if respondent had agreed to a plea of admission motivated solely by a desire to see her child, the plea likely would not have constituted a voluntary plea; thus, it would have been invalid. A case service plan must include, "unless parenting time, even if supervised, would be harmful to the child as determined by the court . . ., a schedule for regular and frequent parenting time between the child and his or her parent, which shall not be less than once every 7 days." MCL 712A.18f(3)(e). Similarly, MCR 3.965(C)(6)(a) provides:

> Unless the court suspends parenting time pursuant to MCL 712A.19b(4) [inapplicable], . . . the court must permit each parent frequent parenting time with a child in placement unless parenting time, even if supervised, may be harmful to the child.

Accordingly, the trial court was obligated to give respondent parenting time unless to do so would have been harmful to the child. This standard honors a parent's rights, while protecting the child's best interests and keeping the child free from harm. It is entirely improper to tie a parenting time decision to whether a parent will enter a plea of admission and give up his or her right to a trial, MCR 3.972. However, because respondent did not enter a plea and was not otherwise harmed, appellate relief is not warranted. That said, we in no way condone the court's actions and emphasize that such conduct is not permissible.

Next, respondent argues that her procedural due process rights were violated where the trial was held immediately after she refused to waive her right to a trial instead of after an adjournment as previously discussed. Respondent also argues that this was improper because she had notice of only a contested pretrial hearing. The notice of the trial was by publication, which stated: "A petition requesting the court to take jurisdiction of the above named minor(s) has been filed in this court. A hearing on the petition will be conducted on February 26, 2013 at 1:30[.]" Therefore, respondent had notice by publication that a hearing on the petition seeking jurisdiction was to be held. "Adjournments of trials or hearings in child protective proceedings should be granted only (1) for good cause, (2) after taking into consideration the best interests of

the child, and (3) for as short a period of time as necessary." MCR 3.923(G). Respondent demonstrated good cause for an adjournment where her attorney was not prepared and had not prepared her as a witness. However, the child's GAL objected to a continuance because of the difficulty in serving the parents, the need to republish a new date for the child's father, and the amount of time publication would take. Considering the amount of time it took to get respondent to court for the jurisdiction trial and the need for a continuance of a couple weeks in order to achieve publication of the new date, the trial court did not abuse its discretion in finding that a further continuance would not have been in the best interests of the child.

Lastly, respondent argues that her procedural due process rights were violated by the trial court's questioning her over her attorney's objection. Trial counsel stated that she would not call respondent to testify because counsel had not had time to prepare her as a witness and because respondent was too emotional. MCR 3.923(A) provides, "If at any time the court believes that the evidence has not been fully developed, it may: (1) examine a witness, (2) call a witness . . . ." It was permissible for the trial court to call respondent as a witness and interrogate her and, therefore, respondent's due process rights were not violated.[1]

III. GROUNDS FOR JURISDICTION

Finally, respondent argues that the trial court reversibly erred in finding that petitioner established sufficient grounds for jurisdiction. We disagree.

A trial court's findings and determination that sufficient grounds existed under MCL 712A.2(b) to assert jurisdiction by a preponderance of the evidence are reviewed for clear error. MCR 3.977(E)(2); MCR 3.972(C)(1); *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004).

The trial court held that petitioner established jurisdiction under MCL 712A.2(b)(1), which provides the court with jurisdiction over children:

> Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

[1] We note that the United States Supreme Court has held that the Fifth Amendment privilege against self-incrimination can be claimed in any proceeding, be it criminal, civil, administrative, judicial, investigatory, or adjudicatory, including juvenile proceedings, protecting disclosures that a witness may reasonably apprehend could be used against the witness in a criminal prosecution or that could lead to other evidence that might be so used. *In re Gault*, 387 US 1, 47-48; 87 S Ct 1428; 18 L Ed 2d 527 (1967). Here, respondent did not invoke her Fifth Amendment rights when the court compelled her to testify; therefore, we find no basis to reverse.

There was evidence at trial that respondent, who allegedly had been using heroin and was working as a prostitute, had refused to complete a drug screen when requested at an initial meeting with a CPS worker,[2] that she failed to complete any part of her preliminary service agreement, that she failed to maintain communications with the CPS worker regarding the minor child's whereabouts, that CPS could not locate respondent at times, and that the child had been bouncing between multiple hotel rooms and between respondent and the child's adult sister. We cannot conclude that the trial court clearly erred in finding jurisdiction.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

[2] While respondent denied that she currently was using heroin, she did tell the CPS worker that she used opiates in the past.